structural and does not preclude harmless error review. *Neder v. U.S.*, 527 U.S. 1, 9 (1999) (emphasis in original).

Relying on this Court's opinion in *Fulminante*, the OCCA reasoned the error in these cases must be structural because, unlike the harmless-error cases addressed in this Court's analysis in *Fulminante*, the instant errors did not occur "during the presentation of the case to the jury" and, therefore, could not "be quantitatively assessed in the context of other evidence presented." *See Golden*, 127 P.3d at 1154 (quoting *Fulminante*, 499 U.S. at 307-08; emphasis added by OCCA is omitted). Such reasoning is flawed, however. For one thing, this Court has not categorically held that errors occurring at times other than "during the presentation of the case to the jury" must automatically constitute structural errors. In fact, this Court has suggested that a rule of "automatic reversal whenever a defendant's right to a certain number of peremptory challenges is substantially impaired[,]" makes little sense in light of its adoption of harmless error review. *See Martinez-Salazar*, 528 U.S. at 317 fn. 4. Thus, the mere fact that the error in this case occurred during the empaneling of the jury rather than during the presentation of the case to the jury hardly justifies the OCCA's expansion of the class of structural errors.

The OCCA, however, also found the error in these cases was structural because it could not "determine what effect [the defendant's] exercise of four additional peremptory challenges, or of the State's for that matter, would have had upon the final make-up of the jury or whether that might have affected the ultimate outcome of the case." *Golden*, 127 P.3d at 1155. "This is the type of error for which prejudice must be presumed[,]" the OCCA held, "because any inquiry into the resulting unfairness or

prejudice is necessarily unquantifiable and indeterminate and would be purely speculative." *Id.* This Court has rejected such reasoning previously.

In *Ross v. Oklahoma*, 487 U.S. 81, 87 (1988), this Court acknowledged that, had errors involving peremptory challenges not occurred, a jury panel actually sitting in a case likely would have been different but refused to "accept the argument that this possibility mandates reversal." Peremptory challenges, this Court noted, are merely "a means to achieve the end of an impartial jury." *Id.*, 487 U.S. at 88. Thus, this Court held, "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." *Id.* Extrapolated to the circumstances of this case, this Court's holding in *Ross* is equally applicable in this instance. That is, "[s]o long as the jury that [sat was] impartial, the fact that the defendant [was granted less than the full complement of peremptory challenges to which he was entitled under state law] does not mean that the Sixth Amendment [or due process] was violated." *Id.* Not only does this extrapolation make sense in this instance where the juries involved were clearly impartial, but it is also supported by this Court's comment in *Martinez-Salazar* that, although it was not deciding what the appropriate remedy would be for the substantial impairment of the right to a certain number of peremptory challenges, automatic reversal for such an error did not seem necessary in light of harmless error review. *See Martinez-Salazar*, 528 U.S. at 317 fn. 4. Therefore, the OCCA's holding that such an error constitutes structural error is clearly wrong.

Furthermore, in light of this Court's limited definition of structural errors, the OCCA's analysis in finding that

the error in this case constitutes a new category of structural error surely misses the mark. As noted previously, the entire reason this Court has held that some errors are structural is because their existence in a defendant's case necessarily renders a trial fundamentally unfair or makes the trial process an unreliable vehicle of justice. *Neder*, 527 U.S. at 9. The only errors found by this Court to so infect a trial are (1) a total deprivation of the right to counsel, (2) the lack of an impartial judge, (3) the unlawful exclusion of grand jurors of a defendant's race, (4) the denial of the right to represent oneself at trial, (5) the failure to conduct a trial in public, and (6) erroneously instructing a jury regarding reasonable doubt. *Johnson*, 520 U.S. at 468-69. The error in the instant cases, however, is materially distinguishable from those errors found by this Court to be structural. That is because, contrary to the OCCA's assertion, whether a defendant's trial was fair and impartial regardless of a deprivation of a certain number of peremptory challenges may be determined from the record of the particular case.

This Court has held that if a defendant had counsel and was tried by an impartial jury, there is a strong presumption that any constitutional error which may have occurred is subject to harmless error analysis. *Neder*, 527 U.S. at 8. Under this Court's description of harmless error analysis, any constitutional error may be harmless if there is no reasonable possibility that the error contributed to the verdict. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Additionally, as noted previously, this Court has suggested that what is important in a constitutional sense is not how an impartial jury is empaneled but that "the jury that sits is [in fact] impartial." *Ross*, 487 U.S. at 88. The records show each respondent in this case was represented by counsel at

trial. Therefore, the inquiry must be whether the defendants' juries were fair and impartial. If so, then the denial of a full complement of peremptory challenges cannot be said to be a structural error because the error would be subject to harmless error review. *Neder*, 527 U.S. at 8-9. In each of the instant cases, the records reflect that none of the jurors sitting in the cases had been challenged for cause and that none of the jurors were so objectionable to the respondents that requests for additional peremptory challenges were made (Golden Trial Tr. I 129, 131, 141; Hogan Trial Tr. I 107, 108-12; Gibbs Trial Tr. I 83, 84-85). Thus, the records reflect that the respondents in this case were satisfied by the juries which were empaneled in their individual cases. Moreover, none of the respondents were able to point to jurors on appeal which they claim should have been dismissed for cause (Golden Direct Appeal Brief at 3-6; Hogan Direct Appeal Brief at 6-12; Gibbs Direct Appeal Brief at 10-12). In fact, none of the respondents even identified any of the sitting jurors whom they would have excused for non-cause reasons had they been given nine peremptory challenges instead of the five they actually exercised. *Id.* As such, the OCCA's determination that the error was incapable of harmless error review and, so, constituted a structural error which demanded automatic reversal in every instance runs counter to this Court's prior pronouncements on the issue. *Martinez-Salazar*, 528 U.S. at 317 fn. 4; *Neder*, 527 U.S. at 8-9; *Fulminante*, 499 U.S. at 310.

The OCCA's unreasonable expansion of structural error to include the erroneous deprivation of a full complement of statutorily-mandated peremptory challenges conflicts with this Court's definition of structural error, its identification of other structural errors, and its suggestion

that this particular error is not structural. Therefore, this Court should grant certiorari to review the OCCA's decisions and correct the state court's overreaching. Rule 10(c), *Rules of the Supreme Court.*

CONCLUSION

For the reasons stated above, Petitioner respectfully requests this Court grant the petition for writ of certiorari.

Respectfully submitted,

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2006 OK CR 2
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RYAN GOLDEN, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	FOR PUBLICATION Case No. F 2004-582

OPINION

(Filed Jan. 10, 2006)

C. JOHNSON, JUDGE:

¶1 Appellant, Ryan Golden, was convicted by a jury in Pottawatomie County District Court, Case No. CF 2003-199, of First Degree Murder, in violation of 21 O.S.2001, § 701.1(A). Jury trial was held on March 9th – 11th, 2001, before the Honorable John Gardner, Associate District Judge. The jury set punishment at life imprisonment without the possibility of parole and Judge Gardner sentenced Appellant in accordance with the jury's verdict on April 16, 2004. From the Judgment and Sentence imposed, Appellant filed this appeal.

¶2 Recitation of the facts surrounding the crime is not necessary because reversible error occurred in the manner of jury selection which requires this matter to be reversed and remanded for a new trial.

¶3 Prior to jury selection, the trial court announced it would call twenty-two (22) names and then the State and the Defendant would each have five (5) peremptory

challenges. (Tr. 18) The trial court stated it would "offer unlimited challenges for cause" but "the law grants both the state and the defendant five preemptory (sic) changes [sic] . . . to excuse any prospective juror for any reason whatsoever." (Tr. 22) In his first claim of error, Mr. Golden argues he must be granted a new trial because he was not afforded the statutorily-prescribed number of peremptory challenges in his first degree murder trial. We agree.

¶4 Title 22, Section 655 provides that in prosecutions for first degree murder, a defendant is entitled to nine peremptory challenges. The statutory language is clear. The trial court erred when it did not allow Mr. Golden nine peremptory challenges. We agree with Mr. Golden that the trial court's error deprived him of his statutory right to nine peremptory challenges and his constitutional right to due process of law. *Marrerro v. State*, 2001 OK CR 12, ¶¶ 11-12, 29 P.3d 580, 582; *Spunaugle v. State*, 1997 OK CR 47, ¶¶ 30-32, 946 P.2d 246, 252, *overruled on other grounds by Long v. State*, 2003 OK CR 14, 74 P.3d 105; *Ross v. Oklahoma*, 487 U.S. 81, 91, 108 S.Ct. 2273, 2280, 101 L.Ed.2d 80 (1988).

¶5 In *Marrerro*, a defendant charged with first degree murder was tried jointly with a co-defendant who was not charged with murder and the trial court required the defendants to share five peremptory challenges. There, we found reversible error and stated "the denial of the full number of peremptory challenges allowed by state law amounted to a structural error that affected the entire trial." *Id.* We noted defense counsel objected at trial and said "under the facts of this case" the error could not be harmless. *Id.* While we found the error in *Marrerro* was structural and reversible, our reference to the "facts of the case" and to preservation of the error suggests this Court

in fact applied a harmless error analysis and did not actually treat the error as structural error.

¶6 In *Spunaugle*, we found the denial of three peremptory challenges in a murder prosecution to be error "which pervaded the entire trial" and which was "not subject to harmless error analysis," but also stated the error was not "waived" and noted facts in the record sufficient to prove prejudice. *Spunaugle*, 1997 OK CR 47, ¶ 32, 946 P.2d at 252. Like *Marrerro*, in *Spunaugle*, the language of our opinion suggests that this Court did not, in fact, treat the error as structural.

¶7 The State admits that depriving a defendant of his full complement of peremptory challenges is error, but suggests the error should be considered harmless because it was waived by the defendant. The State argues counsel's failure to object waives review for all but plain error and further argues that Golden did not make a sufficient record to prove prejudice by claiming he was forced to keep objectionable jurors because of the trial court's error on peremptory challenges.

¶8 This Court has reviewed only two other cases, besides *Marrerro* and *Spunaugle*, wherein the defendant alleged he was deprived of the full complement of statutorily prescribed peremptory challenges and in those cases, the Court required the defendant to prove prejudice.[1] In *Landrum v. State*, 1971 OK CR 235, 486 P.2d 757, the trial court denied the defendant his last five peremptory challenges after his counsel waived the fourth peremptory

[1] This Court has reviewed numerous challenges under the applicable statute relating to co-defendants being required to share peremptory challenges.

challenge. The Court cited the syllabus from *Phelps v. State*, 1965 OK CR 98, 404 P.2d 687, to state:

> It is not error alone that reverses judgments of conviction of crime in this State, but error plus injury, and the burden is upon the appellant to establish the fact that he was prejudiced in his substantial rights by the commission of the error.

Landrum, 1971 OK CR 235, ¶ 13, 486 P.2d 757. In *Landrum*, voir dire was not transcribed and there was nothing in the appeal record for this Court to review. The Court held the defendant had failed to show error coupled with injury and how he might have been prejudiced. *Id.*, 1971 OK CR 235, ¶ 18, 486 P.2d at 759.

¶9 In a murder prosecution in *White v. State*, 1986 OK CR 153, 726 P.2d 905, the trial court allowed the defendant only five peremptory challenges. Defense counsel did not object and did not request additional challenges. Citing *Landrum*, the Court said the burden was on the appellant to "show that he was prejudiced in his substantial rights by the commission of the error" and found the complaint was not sufficient to cause reversal. *Id.*, 1986 OK CR 153, ¶ 4, 726 P.2d at 907.

¶10 We take this opportunity to clarify whether the denial of the statutory number of peremptory challenges in a first degree murder case requires a showing of prejudice or requires automatic reversal. In other words, is it an error subject to harmless error analysis or is it a structural error?

¶11 In *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988), the Supreme Court rejected the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an

impartial jury. "Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. As such, the "right" to peremptory challenges is "denied" or "impaired" only if the defendant does not receive that which state law provides." (citations omitted) *Id.*, 487 U.S. at 89, 108 S.Ct. at 2279.

¶12 Oklahoma law provides that "[I]n all criminal cases the prosecution and the defendant are each entitled to the following peremptory challenges: . . . First. In prosecutions for first degree murder, nine jurors each." 22 O.S.2001, § 655. Oklahoma has therefore determined the number of peremptory challenges allowed and has defined their purpose and the manner of their exercise. *Id.*, 487 U.S. at 89, 108 S.Ct. at 2279. Golden was charged with and tried for the crime of First Degree Murder, and, under Oklahoma law, was entitled to nine peremptory challenges. The record reflects he only received five.

¶13 While the right of peremptory challenge is not protected under the federal constitution, it is specifically provided for and safe-guarded by Oklahoma statute. Deprivation of the right to exercise nine peremptory challenges, which was statutorily due under Oklahoma law, constitutes a due process violation. This is not a case where the defendant claimed he was denied his full complement of peremptory challenges because he had to exercise one to remove a juror whom the trial court should have removed for cause. In this case, Golden was not afforded four challenges to which he was statutorily entitled. Golden did not receive all that was due him under Oklahoma law. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980)

(denial of petitioner's statutory right to have jury determine punishment constituted a violation of due process).

¶14 A constitutional error does not automatically require reversal if it is subject to a harmless error analysis. *Phillips v. State*, 1999 OK CR 38, ¶ 67, 989 P.2d 1017, 1036; *see Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 1263, 113 L.Ed.2d 302 (1991). In *Arizona v. Fulminante*, when discussing the general rule pronounced in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that a constitutional error does not automatically require reversal, the Supreme Court said:

> The common thread connecting these cases [those cases applying *Chapman* /harmless error analysis] is that each involved "trial error" – error which occurred during the *presentation of the case to the jury*, and which may therefore be quantitatively assessed *in the context of other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt.

(emphasis added). *Fulminante*, 499 U.S. at 307-308, 111 S.Ct. at 1264. Harmless error analysis should be applied to an error which occurs in the presentation of the case to the jury and which can be measured against other evidence to determine whether it affected the factual determination of a defendant's guilt or innocence. *Id.*

¶15 Structural errors, which defy harmless error standards, are those defects in the trial itself which affect the framework in which the trial proceeds. *Id.*, 499 U.S. at 310, 111 S.Ct. at 1265. Structural errors recognize that the violation of some constitutional rights may require reversal without regard to the evidence in the particular case. Structural errors are those which affect a trial from

beginning to end, such as the absence of counsel for a defendant, a biased judge, the unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the right to a public trial. *Id.*, 499 U.S. at 309-310, 111 S.Ct. at 1265.

¶16 A structural error is not subject to analysis based on prejudice. *State v. D'Antonio*, 877 A.2d 696, 737 (Conn. 2005) (Katz, J., dissenting). "When a structural error analysis is undertaken and such an error exists, the proceeding is vitiated." *Id.*; *see also State v. Cruz*, 122 P.3d 543, 549 (Utah 2005) ("a structural error analysis presumes prejudice"); *State v. Lamere*, 112 P.3d 1005, 1013 (Mont. 2005) (errors in the jury selection process are structural errors; structural errors are presumptively prejudicial); *Walker v. State*, 868 A.2d 898, 913 (Md.App. 2005), *cert. granted*, 875 A.2d 767 (Md. 2005) ("If a structural error is committed, prejudice is presumed."); *State v. Langley*, 896 So.2d 200, 210 (La.Ct.App. 2004) (judge who was absent from proceedings and failed to maintain proper courtroom decorum caused structural errors requiring reversal without showing of prejudice); *U.S. v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998) (denial of right to exercise peremptory challenges is structural and not subject to harmless error analysis); *U.S. v. Serino*, 163 F.3d 91, 93 (1st Cir. 1998) (finding *Batson* violation structural and reversing without applying harmless error analysis or proof of prejudice); *U.S. v. Gonzalez-Huerta*, 403 F.3d 727, 734 (10th Cir. 2005) ("if, as a categorical matter, a court is capable of finding that the error caused prejudice upon reviewing the record, then that class of errors is not structural").

¶17 While this Court paid lip service to the concept of structural error in *Marrerro* and *Spunaugle* when

discussing the improper denial of peremptory challenges in capital cases, it did not fully consider the breadth of such defects because it applied either a harmless error analysis or implied a proof of prejudice requirement. As the cases cited above from across the country demonstrate, structural errors are not subject to harmless error analysis, do not require a showing of prejudice, and such an error is not measured against the "other evidence" admitted at trial. To the extent *Marrerro, Spunaugle, White*, and *Landrum* are inconsistent with this Opinion, they are hereby overruled.

¶18 The purpose of voir dire in a criminal proceeding is to determine whether there are grounds to challenge prospective jurors and to permit the intelligent exercise of peremptory challenges. *Dodd v. State*, 2004 OK CR 31, ¶ 24, 100 P.3d 1017, 1029. The use of peremptory challenges in voir dire is the principle method of securing a defendant's fundamental right to a fair trial by an impartial jury. *See Moore v. State*, 1995 OK CR 39, ¶ 13, 900 P.2d 996, 1000. Jury impartiality goes to the very integrity of our justice system, and the right to an impartial jury is so essential to our concept of a fair trial that its violation cannot be considered harmless error. *State v. Herrman*, 70 P.3d 738, 742 (Mont. 2003). Not all errors occurring during jury selection are structural; the denial or impairment of the right to peremptory challenges is, however, one of those errors that defy harmless error analysis.

¶19 In this case, the trial court caused structural error by denying Mr. Golden the complete array of peremptory challenges to which he was entitled by Oklahoma law. While defense counsel did not object, the trial court had an affirmative duty to inform the defendant of his right to challenge jurors, 22 O.S.2001, § 651, and its

failure to so inform the defendant of this statutory right and all that it encompassed constitutes clear, structural error. It is evident from the record that the trial court was not aware of the applicable law. "The right to a trial before a fair and impartial jury is the hallmark of the American system of justice, and is guaranteed by both the Federal and Oklahoma constitutions. *See* U.S. Const. amend. VI, Okl. Const. art.II, §§ 19, 20." *White*, 1986 OK CR 153, ¶ 1, 726 P.2d at 909 (Parks, J., dissenting). This Court cannot determine what effect Mr. Golden's exercise of four additional peremptory challenges, or of the State's for that matter, would have had upon the final make-up of the jury or whether that might have affected the ultimate outcome of this case. This is the type of error for which prejudice must be presumed because any inquiry into the resulting unfairness or prejudice is necessarily unquantifiable and indeterminate and would be purely speculative.

¶20 Accordingly, because we find merit to the issue raised in Proposition One, the remaining propositions of error are rendered moot.

DECISION

¶21 The Judgment and Sentence imposed in Pottawatomie County District Court, Case No. CF 2003-199, is hereby ***REVERSED AND REMANDED FOR A NEW TRIAL*** consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeal* [sic], Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY THE HONORABLE JOHN GARDNER, ASSOCIATE DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.

CHAPEL, P.J.: CONCURS
LUMPKIN, V.P.J.: DISSENTS
A. JOHNSON, J.: CONCURS
LEWIS, J: CONCURS

RC

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

¶1 I dissent to the Court's decision to suddenly mandate that it is "structural error" when a defendant is denied the "complete array of peremptory challenges to

which he was entitled by Oklahoma law" and thus beyond the possibility of ever being considered harmless under the facts of the case – even when defense counsel makes no attempt to preserve the error or complain about the jury. It is readily apparent there is a lack of understanding as to what constitutes a "structural" error under current jurisprudence and what the misuse of that term can create by its ripple effect on future cases involving a failure to follow statutory provisions.

¶2 One can easily foresee a situation, somewhere down the appellate road, when a similar situation occurs at trial and defense counsel, although perfectly content with the jury, decides as a matter of strategy not to object to the erroneous denial of all peremptory challenges provided by our statutes. For in so doing, the defense earns a free trial. Even if the State proves its case beyond a reasonable doubt, the defense has a sure-bang winner on appeal.

¶3 I disagree with attempts to anticipatorily "fix" situations in the appellate arena that were never in dispute at the district court level. Here, the defendant was represented by competent counsel, and the record gives no indication that said counsel was not completely satisfied with the jurors who ultimately sat on the case, insofar as their qualifications and ability to be fair.[1] Nevertheless, the Court now abolishes the requirement that a defendant demonstrate prejudice and finds such juries are *ipso facto*

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[1] While defense counsel initially complained that by happenstance the jury pool only had one minority, defense counsel did not challenges [sic] any particular juror for cause. Also, counsel made no record concerning any "unacceptable juror," and there were no requests made for additional peremptory challenges.

unfair, but without ever providing a convincing reason for doing so.

¶4 The Court rightly acknowledges that we have previously required a showing of prejudice in ***all prior cases*** touching upon the issue in question. *See, e.g., Marrerro v. State*, 2001 OK CR 12, ¶ 13, 29 P.3d 580, 582 (despite misusing the term "structural error," the Court appears to have applied harmless error to the issue in question); *Spunaugle v. State*, 1997 OK CR 47, ¶ 32, 946 P.2d 246, 252, *overruled on other grounds, Long v. State*, 2003 OK CR 14, 74 P.3d 105 (the "facts sufficient to prove prejudice are contained in the record, for counsel made a record of those venireman he would remove if he had the correct number of peremptory challenges."); *see also White v. State*, 1986 OK CR 153, ¶ 4, 726 P.2d 905, 907 ("the burden is upon [the defendant] to establish the fact that he was prejudiced in his substantial rights by the commission of error"); and *Landrum v. State*, 1971 OK CR 235, ¶ 18, 486 P.2d 757, 759 ("defendant has failed to show error coupled with injury, and how he might have been prejudiced thereby"). This list does not even include the substantial number of times we have ruled similarly in cases involving the issue of sharing peremptory challenges. *See e.g., Lafevers v. State*, 1991 OK CR 97, 819 P.2d 1362, 1367.

¶5 The Court rationalizes its departure from established Oklahoma law by providing a one line quote or paraphrase concerning "structural error" from other jurisdictions like Connecticut, Montana, and Louisiana and by chastising itself for paying "lip service" to that concept in *Marrerro* and *Spunaugle*. This is curious, however, for *Marrerro* received straight concurring votes and *Spunaugle* took conflicting positions on the issue at

hand – saying the error was beyond harmless error analysis, but then reviewing the record for prejudice (and finding it!). I dissented from *Spunaugle*, as did Judge C. Johnson, who authors today's opinion.

¶6 True, this was a serious error, a deprivation of an important statutory right granted under Oklahoma law. As such, the Court should focus more of its analysis upon whether Appellant was deprived of due process guaranteed by our Constitution. Indeed, constitutional error clearly occurred here, as Appellant's statutory right to peremptory challenges was "denied or impaired" by not receiving that which state law provides. *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273, 2277, 101 L.Ed.2d 80 (1988). Appellant was not denied one peremptory challenge, but four![2]

¶7 But constitutional errors ***may*** be found to be harmless if the court can declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). And yet, the Court's decision today sidesteps this well-known principle by relying on controversial language from *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991).[3] There, the

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[2] That being so, I don't believe Appellant would have to go very far in order to establish prejudice, if he had in fact been dissatisfied with the jurors chosen and was truly being prejudiced. But at the very least, he should use up all peremptory challenges given and provide the district court *some* opportunity to correct its mistake.

[3] *Fulminante* was so contentious and sharply divided that it is difficult to determine which part of the opinion is the majority opinion. Part I of Justice White's four-part opinion received six votes, while parts II (from which the quoted language in today's opinion is taken)

(Continued on following page)

Supreme Court attempted to separate "trial errors" from "structural errors". But *Fulminante's* effort to once and for all categorize and distinguish between these two types of errors has proven largely unsuccessful, as many Courts including the U.S. Supreme Court have since struggled to apply it and some commentators have argued that *Fulminante* was "analytically flawed from the outset." McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U.Kan.L.Rev. 1401 (1996); *see also, State v. Calderon*, 270 Kan. 241, 250-53, 13 P.3d 871, 877-79. Indeed, one member of the Court has written that the Supreme Court's harmless error jurisprudence is "confused and illogical" and that the trial error/structural error analysis in *Fulminante* has resulted in "fictional distinctions." *See Flores v. State*, 1999 OK CR 52, ¶ 1, 994 P.2d 782, 787 (Chapel, J., concurring in result).

¶8 I touched upon this same issue in my dissent to *Flores v. State*, 1995 OK CR 31, ¶ 13, 899 P.2d 1162, 1172, by quoting from the dissenting portion of Justice White's opinion in *Fulminante*, as follows:

> These cases cannot be reconciled by labeling the former 'trial error' and the latter not, for both concern the exact same stage in the trial proceedings. Rather, these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial.

Fulminante, 499 U.S. at 291, 111 S.Ct. at 1255. In other words, we should not draw a line in the sand and all cases that fall under the definition of "trial error" are subject to

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and IV received only five votes. Meanwhile, part II of Chief Justice Rhenquist's [sic] three-part opinion received five votes.

harmless error analysis, while all others are not. Rather, we must look to the right in question and assess its overall effect on the trial.

¶9 The truth of the matter is that the Supreme Court has recognized that "most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306, 111 S.Ct. at 1263. Indeed, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986). Moreover, since *Fulminante* was decided, the Supreme Court has only found an error to be "structural," and thus subject to automatic reversal, in a "very limited class of cases", approximately six, and none of those cases involved peremptory challenges. *See Neder v. U.S.*, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999).[4]

¶10 The opinion finds that the trial court "caused" this structural error by being ignorant of the applicable law. But the same can be said of defense counsel, who was either (1) unaware that the defendant was entitled to nine peremptory challenges, (2) was deliberately aware that he was entitled to four more peremptory challenges but was

[4] Indeed, an argument could be made, based upon U.S. Supreme Court jurisprudence, that Appellant has no standing to raise a constitutional claim purely on the number of peremptory challenges received, for in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the Court stated it was the juror's right to serve that was being adjudicated in the exercise of these challenges. While I have previously pointed out that the Supreme Court has painted itself into a corner on the issue with paint that will never dry, I recognize we ultimately have a due process issue here, regardless of how we get there.

pleased with the jury, or (3) aware that the trial judge had committed an error that would likely result in reversal.

¶11 So who do we pin the blame on? In my opinion, it is defense counsel's duty to object to errors occurring during the course of the trial. In the absence of an objection or any demonstrative showing of prejudice, I would presume that defense counsel knew the law, but believed the jury seated was fair.[5] By focusing on the right in question – here a statutory one – rather than broad labels, we see no evidence that the error impacted the fairness or integrity of this trial.

¶12 The error here was really no different than any other erroneous ruling on evidence or procedure occurring during trial. As such it was "trial error" that was subject to harmless error analysis. Due to the fact that Appellant has provided nothing to show the jurors who were actually seated and who did render a verdict were unacceptable, prejudicial in any way, or that any would have been excused if additional peremptories were provided, I cannot find prejudice in the record. Thus, the violation of the statutory right in this case was harmless, and the judgment and sentence should be affirmed.

[5] If, however, the record demonstrated ineffective assistance of counsel or that an unacceptable juror had been seated, then reversal would be required.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DARRELL W. HOGAN, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)))))))	NOT FOR PUBLICATION Case No. F-2004-1266

OPINION

(Filed Feb. 10, 2006)

CHAPEL, PRESIDING JUDGE:

Darrell W. Hogan was tried by jury and convicted of First Degree Murder in violation of 21 O.S.2001, § 701.7, in the District Court of Pittsburg County, Case No. CF-2004-300. Following the jury's recommendation, the Honorable Thomas M. Bartheld sentenced Hogan to life imprisonment without the possibility of parole. Hogan has perfected his appeal of this conviction.

On the morning of February 24, 2004, Darrell Hogan killed his cellmate, James Wise, at the Oklahoma State Penitentiary. Early that morning, Wise had held a knife to Hogan's throat, threatening to kill him if he failed to hand over later-acquired canteen items. When Hogan agreed, Wise withdrew and put away the knife.

About two hours later, Hogan placed a sheet over the cell door window to bar outsiders' view. He removed the drawstring from a laundry bag, choked Wise with it until Wise collapsed approximately five minutes later, then flushed the drawstring down the toilet and summoned a

guard. Wise was taken for immediate medical attention for his injuries but died three weeks later. Hogan was interviewed by an internal investigator and confessed to killing Wise.

Hogan raises a single proposition of error, claiming entitlement to a new trial because he was denied full exercise of his peremptory challenges. A defendant on trial for first-degree murder is entitled to nine (9) peremptory challenges.[1] Hogan was only allowed five (5) peremptory challenges at trial. Due process is violated when a defendant is denied a statutory right.[2] Moreover, this Court recently reversed a case for this precise error.[3] We reverse and remand Hogan's Judgment and Sentence for a new trial.

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[1] 22 O.S.2001, § 655.

[2] *Golden v. State*, 2006 OK.CR 2, ___ P.3rd ___; (denial of statutorily mandated peremptory challenges mandates reversal).

[3] *Id.*

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OPINION BY:
CHAPEL, P. J.
LUMPKIN, V.P.J.: DISSENT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J: CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

As I stated in my dissent to *Golden v. State*, 2006 OK CR 2, I disagree with this Court finding a harmless error analysis is not applicable to the denial of the statutory right of 9 peremptory challenges in a first degree murder

trial. As in *Golden*, constitutional error occurred here as Appellant's statutory right to peremptory challenges was denied or impaired by not receiving that which state law provides. However, except for certain specifically delineated situations, constitutional errors have historically been subject to a harmless error analysis. *See Neder v. U.S.*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L.Ed.2d 35 (1999), *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). *See also Bartell v. State*, 1994 OK CR 59, 881 P.2d 92.

Applying a harmless error analysis to the present case, I find the error harmless beyond a reasonable doubt. The record shows that at trial defense counsel did not object to the limited number of peremptory challenges. Now on appeal, Appellant has not argued or shown he was prejudiced by the lack of peremptory challenges. As I cannot find error from a silent record, or prejudice from anything in the current record, the violation of the statutory right in this case was harmless, and the judgment and sentence should be affirmed.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FRANKLIN LEE GIBBS, JR., Appellant,	)	NOT FOR PUBLICATION
-vs-	)	
THE STATE OF OKLAHOMA, Appellee.	)	No. F-2004-649

OPINION

(Filed Mar 9, 2006)

A. JOHNSON, J.:

Franklin Lee Gibbs, Jr., Appellant, was tried by jury in the District Court of Pittsburg County, Case No. F-2004-29, and convicted of Count I, First-Degree Murder in violation of 21 O.S.2001, § 701.7(A) and Count II, Felon in Possession of a Firearm, After Former Conviction of Two Felonies in violation of 21 O.S.Supp.2002, § 1283. The jury fixed Gibbs's punishment at life imprisonment without the possibility of parole on Count I and 50 years imprisonment on Count II. The trial court sentenced him accordingly and ordered the sentences to run concurrently. From this Judgment and Sentence, Gibbs appeals. We reverse.

A recitation of the facts is not necessary as this case must be reversed and remanded for new trial because of an error in jury selection. Gibbs argues in his second proposition that the trial court's award of only five peremptory challenges during jury selection in his first-degree

murder trial denied him due process.[1] We recently addressed this identical claim and held that the denial of the full complement of statutorily prescribed peremptory challenges in a first degree murder case is reversible error. *Golden v. State,* 2006 OK CR 2, ¶ 19, 127 P.3d 1150. *Golden* is dispositive. Because Gibbs was only given five peremptory challenges instead of nine, his case must be reversed for a new trial.

We also address Proposition III to avoid any error on retrial. Gibbs asserts that the trial court erred when it allowed the prosecutor to use his three prior convictions to enhance his first-degree murder charge. The record shows that the State filed a second page and sought to enhance Gibbs's sentence on his felon in possession charge (Count 2) with two of his three prior felony convictions.[2] Gibbs's three prior felony convictions were also included in the title of the first-degree murder verdict form, which read, "MURDER, FIRST DEGREE AFTER THREE PREVIOUS CONVICTIONS." Gibbs contends the inclusion of his three prior convictions in the first-degree murder verdict form's title acted as evidence to enhance his sentence from life with the possibility of parole to life without the possibility of parole. Gibbs objected to the verdict form on this basis at trial.

It is obvious that the State cannot enhance a non-capital first-degree murder conviction with a defendant's prior convictions. The punishment range for persons who

[1] Title 22 O.S.2001, § 655 explicitly grants both parties in a first-degree murder case nine peremptory challenges.

[2] One of Gibbs's prior convictions was used as an element of the felon in possession charge and could not be used to then enhance his sentence.

have been twice convicted of felony offenses, and who subsequently commit an enumerated offense in 57 O.S.2001, § 571 within ten (10) years of the previous convictions, is twenty (20) years to life imprisonment. 21 O.S.2001, § 51.1(B). Punishment for first-degree murder is death, life imprisonment without parole, or life imprisonment. 21 O.S.2001, § 701.9(A). Although first degree murder is an enumerated offense in § 571 and thus a crime potentially subject to enhancement, permitting enhancement would allow habitual offenders to receive a punishment range less than that prescribed for first time offenders charged with first-degree murder. Such a construction is unreasonable. Rules of statutory construction require us "to ascertain and give effect to the intention of the Legislature as expressed in the statute." *State v. Anderson*, 1998 OK CR 67, ¶ 3, 972 P.2d 32, 33 (citing *Thomas v. State*, 1965 OK CR 70, ¶ 4, 404 P.2d 71, 73). We look to "each part of the [statute], to other statutes upon the same or relative subjects, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation." *Thomas*, 1965 OK CR 70, ¶ 4, 404 P.2d at 73. Allowing enhancement of a first-degree murder sentence yields "absurd" consequences and cannot be permitted.

It was error to include Gibbs's prior convictions in the title of the first-degree murder verdict form as Gibbs's murder charge could not be enhanced. On retrial, Gibbs's prior convictions may be used only to enhance his felon in possession charge and not his first degree murder charge.

The Judgment of the district court is **REVERSED** and this matter is **REMANDED** to the district court for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2005),

the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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ATTORNEYS FOR APPELLEE

OPINION BY: A. JOHNSON, J.

CHAPEL, P.J.:	Concurs
LUMPKIN, V.P.J.:	Concurs in Results
C. JOHNSON, J.:	Concurs
LEWIS, J:	Concurs

RC

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RYAN GOLDEN,	)	
	)	
Appellant,	)	Case No. F 2004-582
v.	)	
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

(Filed Mar. 9, 2006)

On January 10, 2006, this Court reversed Appellant's conviction and sentence and remanded the matter to the District Court of Pottawatomie County for a new trial. *Golden v. State*, 2006 OK CR 2, ___ P.3d ___. On January 25, 2006, Respondent State of Oklahoma, filed a Petition for Rehearing, pursuant to Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006). Therein, Respondent claims our decision in *Golden* is in conflict with decisions of the United States Supreme Court "to which the attention of this Court was not called either in the brief or in oral argument."

Rule 3.14 provides that a petition for rehearing shall not be filed as a matter of course, but only for the following reasons: some question decisive of the case and duly submitted was overlooked by the Court or "the decision is in conflict *with an express statute or controlling decision* to which the attention of this Court was not called either in the brief or in oral argument." (emphasis added) *See* Rule 3.14(B)(2). Upon review of the cases cited in Respondent's Petition for Rehearing, we find the cases do not constitute

controlling authority on the question presented in this case and do not require this Court to revisit and reconsider our Opinion.

Accordingly, we find the Petition for Rehearing should be, and hereby is, **DENIED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 9th day of March, 2006.

/s/ Charles S. Chapel
CHARLES S. CHAPEL, Presiding Judge

/s/ Gary L. Lumpkin Dissent Writing Attached
GARY L. LUMPKIN, Vice Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Judge

/s/ Arlene Johnson
ARLENE JOHNSON, Judge

/s/ David B. Lewis
DAVID B. LEWIS, Judge

ATTEST:

/s/ Michael S. Richie
Clerk

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

I find the Petition for Rehearing has merit. The State makes several valid points and, when considered in light of the cases that have addressed this issue since this case was first decided, reveals why decisions of this type should not be made in a vacuum. Now having had the opportunity

to experience the "ripple effect" of the Court's decision, this Court should grant rehearing in this case, request additional briefing on the question of the violation of a statutory right being elevated to a "structural error", and set the case for oral argument. I would urge the Court to do just that.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DARRELL W. HOGAN, Appellant,	)	Case No. F-2004-1266
v.	)	
STATE OF OKLAHOMA Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

(Filed Mar. 22, 2006)

After a jury trial in Pittsburg County District Court Case No. CF-2004-300, Darrell Hogan was convicted of First Degree Murder in violation of 21 O.S.2001, § 701.7. Following the jury's recommendation, the Honorable Thomas M. Bartheld sentenced Hogan to life imprisonment without the possibility of parole.

By its February 10, 2006, unpublished opinion, this court reversed Hogan's convictions and sentences and remanded for a new trial. The State is now before the Court on a Petition for Rehearing. A Petition for Rehearing shall be filed for two reasons only:

(1) Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

(2) The decision is in conflict with an express statute or controlling decision to which the

> attention of this Court was not called either in the brief or in oral argument.[1]

The State's argument in his Petition for Rehearing fails to meet the criteria set forth in Rule 3.14 and is denied.[2]

IT IS THEREFORE THE ORDER OF THE COURT that the Petition for Rehearing is **DENIED.** The Clerk of the Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of March, 2006.

/s/ Charles S. Chapel
CHARLES S. CHAPEL, Presiding Judge

/s/ Gary L. Lumpkin Dissent Writing Attached
GARY L. LUMPKIN, Vice Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Judge

/s/ Arlene Johnson
ARLENE JOHNSON, Judge

/s/ David B. Lewis
DAVID B. LEWIS, Judge

---

[1] Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18. App. (2005).

[2] The State's petition presents the Court with no argument or authority that was not considered in the resolution of this appeal.

ATTEST:

/s/ Michael S. Richie
Clerk

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

I find the Petition for Rehearing has merit. The State makes several valid points and, when considered in light of the cases that have addressed this issue since this case was first decided, reveals why decisions of this type should not be made in a vacuum. Now having had the opportunity to experience the "ripple effect" of the Court's decision, this Court should grant rehearing in this case, request additional briefing on the question of the violation of a statutory right being elevated to a "structural error", and set the case for oral argument. I would urge the Court to do just that.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RYAN GOLDEN,	)	
	)	
Appellant,	)	Case No. F 2004-582
v.	)	
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ORDER DENYING MOTION TO RECALL MANDATE

(Filed Apr. 5, 2006)

On March 15, 2006, the State of Oklahoma filed a Motion to Recall Mandate in the above-styled and numbered cause, pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006). Therein, the State requests this Court to "recall and stay the mandate" while the State seeks certiorari review to the U.S. Supreme Court.

We see a clear distinction between our holding in this case and *Rojem v. State*, 2006 OK CR 7, ___ P.3d ___. Rule 3.15 is permissive, upon a majority vote of the members of the Court, and does not require this Court to stay or recall a mandate because the State intends to appeal to the U.S. Supreme Court.

Accordingly, the Motion to Recall the Mandate is **DENIED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 5th day of April, 2006.

/s/ Charles S. Chapel
CHARLES S. CHAPEL, Presiding Judge

/s/ Gary L. Lumpkin Dissent
GARY L. LUMPKIN, Vice Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Judge

/s/ Arlene Johnson
ARLENE JOHNSON, Judge

/s/ David B. Lewis
DAVID B. LEWIS, Judge

ATTEST:

/s/ Michael S. Richie
Clerk

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FRANKLIN LEE GIBBS, JR.,	)	
Appellant,	)	No. F-2004-649
-vs-	)	
STATE OF OKLAHOMA,	)	
Appellee.	)	

ORDER DENYING MOTION TO RECALL MANDATE

(Filed Apr. 5, 2006)

On March 27, 2006, the State of Oklahoma Filed a Motion to Recall Mandate in the above-styled and numbered cause, pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006). Therein, the State requests this Court to "recall and stay the mandate" while the State seeks certiorari review to the United States Supreme Court.

Rule 3.15 is permissive, upon a majority vote of the members of the Court, and does not require this Court to stay or recall a mandate because the State intends to appeal to the United States Supreme Court.

Accordingly, the Motion to Recall the Mandate is **DENIED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 5th day of April, 2006.

/s/ Charles S. Chapel
CHARLES S. CHAPEL, Presiding Judge

/s/ Gary L. Lumpkin Dissent
GARY L. LUMPKIN, Vice Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Judge

/s/ Arlene Johnson
ARLENE JOHNSON, Judge

/s/ David B. Lewis
DAVID B. LEWIS, Judge

ATTEST:

/s/ Michael S. Richie
Clerk

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DARRELL W. HOGAN, Appellant,	)	
v.	)	Case No. F-2004-1266
STATE OF OKLAHOMA Appellee.	)	

ORDER DENYING MOTION TO RECALL MANDATE

(Filed Apr. 19, 2006)

After a jury trial in Pittsburg County District Court Case No. CF-2004-300, Darrell Hogan was convicted of First Degree Murder in violation of 21 O.S.2001, § 701.7. Following the jury's recommendation, the Honorable Thomas M. Bartheld sentenced Hogan to life imprisonment without the possibility of parole.

By its February 10, 2006, unpublished opinion, this court reversed Hogan's convictions and sentences and remanded for a new trial. The State is now before the Court on a Motion to Recall Mandate. A mandate will only be recalled for "good cause."[1] The State's argument in the Motion to Recall Mandate fails to establish "good cause" pursuant Rule 3.15 and is denied.[2]

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[1] Rule 3.15(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18. App. (2006).

[2] The State's disagreement and desire to appeal the Court's decision in this case (which is based upon a decision in another case) is not enough to justify recalling the mandate.

IT IS THEREFORE THE ORDER OF THE COURT that the Petition for Rehearing is **DENIED**. The Clerk of the Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 19th day of April, 2006.

/s/ Charles S. Chapel
CHARLES S. CHAPEL, Presiding Judge

/s/ Gary L. Lumpkin Dissent
GARY L. LUMPKIN, Vice Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Judge

/s/ Arlene Johnson
ARLENE JOHNSON, Judge

/s/ David B. Lewis
DAVID B. LEWIS, Judge

ATTEST:

/s/ Michael S. Richie
Clerk